

SELECTED LEGAL ISSUES FOR LOCAL GOVERNMENT ATTORNEYS RELATED TO IMMIGRATION STATUS

1. Provision of Services or Benefits

- a. Public Schools. The public schools in each school division shall be free to each school age child who resides within that school division. Va. Code § 22.1-3. The Attorney General of Virginia has issued an official opinion that a local school board may not require documentation to verify a student's citizenship for purpose of determining whether he is a bona fide resident qualified to attend free public school in the district. 1999 Op.Atty.Gen.Va. 105. This is consistent with a 1979 Attorney General opinion that the citizen or visa status of an alien student does not affect his eligibility for tuition-free education. 1979 Op.Atty.Gen.Va. 292.

A 1982 U.S. Supreme Court decision established that children who are illegal aliens may not be presumptively excluded from the free public schools, under the equal protection clause of the Fourteenth Amendment of the federal constitution. *Plyler v. Doe*, 457 U.S. 202 (1982).

- b. Other Services. Some local services are under the control and direction of state agencies (e.g., Health Department, Extension, Juvenile Court Services Unit). Libraries receiving state aid must be made available to all persons living in the county. Va. Code § 42.1-55. There are programs administered locally under regulations promulgated by the state or federal government (e.g., certain housing programs). Some services are provided under the terms or direction of a court order.
- c. Equal Protection. *Plyler* states that the equal protection clause applies to all within the boundaries of the state, including aliens unlawfully present. In that particular case, the state law violated the equal protection clause by denying benefits to certain persons without a showing that it advanced a substantial state interest. The Court appeared to emphasize two factors in its decision. First, the children of illegal aliens were not in the country as a result of their own conduct, but due to the conduct of their parents. Second, a public education was not viewed as merely some governmental benefit, but a matter of basic importance.
- c. Federal Requirements to Verify Status. The Personal Responsibility and Work Opportunity Act of 1996 provides that an alien who is not a "qualified alien" is ineligible for certain federal, state and local "public benefits." Local government agencies, such as the social services department, check the status of recipients of many types of benefits, as required by this federal law.

2. **Regulation and Taxation of Businesses**

- a. Federal Preemption. In a non-binding letter, the Attorney General's office has provided an analysis of the federal preemption doctrine as it relates to local regulation of businesses with respect to employment of illegal aliens. The federal government has created a comprehensive scheme to prohibit the employment of illegal aliens, under the federal Immigration Reform and Control Act of 1986. Localities are limited in adopting local ordinances attempting to enforce federal immigration policy related to the hiring of illegal aliens with respect to local businesses.
- b. BPOL Tax. In a 2006 official opinion, the Attorney General concluded that the local commissioner of revenue is not required to issue business licenses to illegal aliens and should verify the status of the applicant. Legislation to this effect did not pass in the last session of the General Assembly.

3 **General Law Enforcement Authority and Issues – Outside of a 287(G) Agreement.**

- a. Specific authority to arrest certain illegal immigrants: §19.2-81.6, VA Code Ann.

If a person is

Suspected of committing a crime

And officer gets confirmation from ICE that person

Is a previously deported felon

And person is now present in U.S.

- b. General authority to arrest on a warrant or “want” for a criminal immigration violation: §19.2-81, VA Code Ann.

Describes powers of arrest of, among others, County police (§19.2-81(3) includes them in the list)

Officer can arrest, without a warrant or capias, persons duly charged with crime in another jurisdiction, upon receipt of a photocopy of a warrant or a capias, telegram, computer printout, fax, radio, telephone or teletype so long as it has a name or a reasonably accurate description of the person wanted

In our view an outstanding criminal warrant for a federal immigration violation or an ICE hit for “previously deported felon” fit within this category of charge. On the other hand, an NCIC hit that reveals “administrative warrant of removal,” indicates that the federal government is engaged in a civil process with the person which is insufficient, in our opinion, to authorize an arrest solely on that ground.

- c. Determination whether to put someone under arrest where a summons is otherwise required or authorized -- §19.2-74(A), VA Code Ann.

This says the officer must issue a summons to someone who commits a local ordinance violation or a Class 1 or 2 misdemeanor which can result in a jail term, unless the “person is reasonably believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or any other person” then the officer can arrest and take the person to a magistrate.

In our view, the existence of an ICE entry in NCIS “administrative warrant of removal,” indicates that the person has failed to appear for a deportation hearing, or has failed to leave the country after being ordered to do so. This situation can be considered by an officer in deciding whether a person would be likely to disregard a summons or break a written promise to appear in court.

- d. Draft Prince William County General Orders 45.01 AND 45.02

These are attached. We believe these are within our Police Department’s legal authority as a law enforcement agency in Virginia to enact. All officers will be trained on these new General Orders starting next week. Once the training is complete, the General Orders will go into effect – probably in March, 2008.

- e. ICE agreements with local law enforcement agencies pursuant to 8 U.S.C. § 1357(g) a.k.a. 287(g).

Local governments have the authority under §15.2-1726, Virginia Code Ann., to enter into agreements with the federal government pursuant to Section 287(g) under which certain local law enforcement officers or jail personnel will receive extensive training from the Department of Homeland Security Bureau of Immigration and Customs Enforcement (ICE). Once trained, the individual officers will have the authority to enforce federal immigration law under the direct supervision of ICE.

f. Issues confronting local law enforcement

Need to maintain trust in all communities residing in Prince William, including minority and immigrant communities, in order to continue effective policing efforts.

Need to avoid perception that officers are acting unconstitutionally – that they are engaging in racial profiling or other illegal discrimination.

Need to protect victims and witnesses who may themselves be illegal immigrants, and encourage them to cooperate with the police in that effort.

Need to avoid dangerously overcrowding the local jail.

Need to manage citizen expectations. We are striving to implement a fair, reasonable and legal local law enforcement response to the problem of illegal immigration, but that alone will not solve the problem of illegal immigration, and this must be constantly reiterated with the citizens.

PRINCE WILLIAM COUNTY POLICE DEPARTMENT MANUAL OF GENERAL ORDERS <u>(PROPOSED)</u>		
General Order: 45.01	Effective:	Number of Pages: 4
LOCAL ENFORCEMENT RESPONSE TO ILLEGAL IMMIGRATION : GENERAL GUIDELINES		

- A. The purpose of this General Order is to establish a policy for the local participation of the enforcement of immigration laws. It is not intended to limit the Police Department's authority under the United States or Virginia Constitutions or under any other laws.
- B. Although immigration enforcement is vested in the Federal government, local law enforcement has an increasing role in identifying, investigating, and apprehending persons who may be in violation of federal immigration law, particularly those who commit other violations of law. Preliminary investigations shall encompass all who are lawfully detained within the guidance provided by this General Order and the law. The primary focus of police investigative efforts will be those who may be in violation of federal immigration law who are criminal aliens, as defined in Section F.
- C. If there is probable cause to believe a person is in violation of federal immigration law and when such inquiry will not unlawfully expand the duration of the detention, it is the policy of this Department that officers shall investigate the citizenship or immigration status of a person who is lawfully detained for a violation of a state law or county ordinance by following the procedures set out in this General Order. An officer may inquire into immigration status prior to the establishment of probable cause if he has reasonable articulable suspicion as part of initial identification inquiry to acquire an understanding of the facts which may lead to the discovery of additional facts that would lawfully support an extension of the initial detention for further investigation into immigration matters. As previously stated, this General Order is not intended to limit the Police Department's authority under the Fourth Amendment of the United States Constitution.
- D. Racial profiling, the practice of stopping, detaining, or searching a person based solely on factors such as their race, color, or ethnicity, is prohibited and in fact, illegal. Race, color, ethnicity, or other non-criminal traits are not, in and of themselves, sufficient to constitute reasonable suspicion or probable cause to justify stopping, detaining, or searching a person (see General Order 2.01, C- 56).
- E. Public Safety is enhanced when victim's file police incident reports. Therefore, victims and essential witnesses will not be subject to immigration inquiries as a matter of routine.
- F. Description of Frequently Used Terms;
 1. **Alien** – A person who is not a citizen of the United States.
 2. **Alien Absconders** - A fugitive remaining in the United States after an immigration judge has ordered them deported.

3. **Criminal Alien** – Aliens who have committed crimes that make them eligible to be removed from the United States.
4. **Foreign National** – A person who is not a permanent United States resident.
5. **Illegal Alien** - A person who has entered the country illegally and is deportable or is residing in the United States illegally after entering legally (for example, using a tourist visa and remaining after the visa expires).
6. **Undocumented Immigrant** – Any person of another country who has entered or remained in the United States without permission and without legal status.
7. **ICE** - U.S. Department of Homeland Security's Bureau of Immigration and Customs Enforcement
8. **LESC** - the ICE Law Enforcement Support Center
9. **National Crime Information Center (NCIC) Wanted Status (Hits)** – At this time there are two types of Hits:
 - a) **"OUTSTANDING ADMINISTRATIVE WARRANT OF REMOVAL"** – This NCIC hit pertains to an ICE Federal *civil process*. This language in NCIC means that the individual has been ordered to leave the Country but has not complied with the order.
 - b) **"PREVIOUSLY DEPORTED FELON"** – A type of NCIC Hit that pertains to an ICE Federal Criminal Felony.
10. **Permanent Resident Alien** – Any person who is residing in the United States as a legally recognized and lawfully recorded permanent resident.
11. **Legal presence** - A person who is legally present is either a U.S. citizen or is legally authorized to be in the United States. Legal presence can be proved using a U.S. birth certificate or U.S. passport. It also can be proved using a variety of other government issued documents such as a Certificate of Citizenship or Naturalization, Resident Alien Card or a valid foreign passport with a visa, I-94 or an I-94W with a participating country. Documents presented as proof of legal presence must show the full legal name and date of birth. Virginia's legal presence law took effect on January 1, 2004. A list of accepted documents under that law is available at:

<http://www.dmv.state.va.us/webdoc/pdf/dmv141.pdf>.

12. **Probable Cause** – The legal standard of probable cause, as the term suggests, relates to probabilities that are based upon the factual and practical considerations in everyday life as perceived by reasonable and prudent persons. The presence or absence of probable cause is not to be examined from the perspective of a legal technician. Rather, probable cause exists when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. *Draper v. United States*, 358 U.S. 307, 313 (1959); *Schaum v. Commonwealth*, 215 Va. 498, 500, 211 S.E.2d 73, 75 (1975). In order to ascertain whether

probable cause exists, courts will focus upon "what the totality of the circumstances meant to police officers [Page 821] trained in analyzing the observed conduct for purposes of crime control." *Hollis v. Commonwealth*, 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976).

Taylor v. Commonwealth, 222 Va. 816, 820-821, 284 S.E.2d 833 (1981), cert denied, 456 U.S. 906 (1982)

"An apparent state of facts found to exist upon reasonable inquiry, (that is, such inquiry as the given case renders convenient and proper,) which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or in a civil case that a cause of action existed." (Black's Law Dictionary)

G. Verification of Legal Presence

For purposes of this policy, the Department shall be guided by §46.2-328.1 *Code of Virginia* in determining what forms of identification are sufficient to establish legal presence.

Generally, a **valid Virginia** Driver's License or Special Identification card (Adult ID card, Child ID card, or Hearing Impaired Photo ID Card – commonly referred to as a "Walker's ID"), with an **ORIGINAL issued date of January 1, 2004 or later**, shall serve as proof of legal presence, as noted in § 46.2-328.1 *Code of Virginia* (Virginia's legal presence law took effect on January 1, 2004).

Legal presence may be determined by checking nationwide databases maintained by ICE or by contacting the ICE Law Enforcement Support Center (LESC).

H. Legal Authority for Enforcement of Immigration Laws (see General Order 45.02).

Warrants and detainers issued by ICE may be criminal or civil. Whether ICE is proceeding criminally or civilly against the subject controls the response of local law enforcement.

POLICE **MAY ARREST** under any of the following conditions:

- 1) The requirements of §19.2-81.6 *Code of Virginia* are satisfied.

§19.2-81.6 *Code of Virginia* - All law-enforcement officers enumerated in § 19.2-81 shall have the authority to enforce immigration laws of the United States, pursuant to the provisions of this section. Any law-enforcement officer enumerated in § 19.2-81 may, in the course of acting upon reasonable suspicion that an individual has committed or is committing a crime, arrest the individual without a warrant upon receiving confirmation from the Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security that the individual (i) is an alien illegally present in the United States, and (ii) has previously been convicted of a felony in the United States and deported or left the United States after such conviction. Upon receiving such confirmation, the officer shall take the individual

forthwith before a magistrate or other issuing authority and proceed pursuant to § 19.2-82.

- 2) An NCIC **Immigration Violator File (IVF)** hit reads **“PREVIOUSLY DEPORTED FELON,”** a hit confirmation is received, **AND** a Criminal Immigration Detainer from ICE is received and/or issued.
- 3) An NCIC IVF hit reads **“OUTSTANDING ADMINISTRATIVE WARRANT OF REMOVAL”** (such NCIC warrants are considered civil in nature), **AND** the officer has charged a person for a separate Class 1 or Class 2 misdemeanor or a traffic infraction, for which the law requires the person be released on a summons in accordance with §19.2-74 *Code of Virginia* or §46.2-940 *Code of Virginia*, the NCIC IVF hit, absent extenuating circumstances, shall be considered as a **factor** to proceed under §19.2-82 *Code of Virginia* (Arrest without warrant), in determining whether the person is likely to disregard the summons. *NOTE: When there is probable cause to believe someone is an illegal alien but NO NCIC IVF Hit is received/returned on the person, the law is unclear as to whether the absence of such a hit is to be considered a factor in determining whether the person should be brought before the magistrate on the local charge. In such cases where there is no NCIC IVF Hit, officers shall make a determination based on all available information as to whether the person is likely to disregard the summons and shall act accordingly.*

POLICE **MAY NOT ARREST** under the following conditions:

1. Solely because a person is an illegal alien. This is because the Police Department has no legal authority to independently enforce Federal Immigration Law. When probable cause exists to believe a person may be an illegal alien a Field Interview Card shall be completed and forwarded to the Crime Analysis Unit. The Crime Analysis Unit shall in turn forward the information to the ICE LESC.
2. Solely based upon an NCIC IVF hit which reads **“OUTSTANDING ADMINISTRATIVE WARRANT OF REMOVAL.”** These are considered civil in nature. Officers have no authority to arrest based solely on **CIVIL** administrative warrants or detainers for immigration issues. A Field Interview Card shall be completed and forwarded to the Crime Analysis Unit. The Crime Analysis Unit shall in turn forward the information to the ICE LESC.

PRINCE WILLIAM COUNTY POLICE DEPARTMENT MANUAL OF GENERAL ORDERS (PROPOSED)		
General Order: 45.02	Effective:	Number of Pages: 4
LOCAL ENFORCEMENT RESPONSE TO ILLEGAL IMMIGRATION: MEMBER RESPONSIBILITIES		

A. Officer Response:

1. Officers shall investigate the citizenship or immigration status of any person who is lawfully detained for a violation of a state law or county ordinance, if (1) probable cause exists to believe such person is in violation of federal immigration laws; (2) the inquiry has not already occurred in the encounter, and (3) the inquiry will not unlawfully expand the duration of the detention. There may be circumstances under which the Fourth Amendment authorizes an earlier inquiry and officers may use their discretion in accordance with training to investigate immigration status at an earlier stage.

Officers must remain cognizant at all times of the legal justification to continue detention of a person. The permissible length of a lawful detention in every instance depends on all circumstances.

Officers are reminded there is no law compelling a person to identify himself or herself to a law enforcement officer in all instances. However, presenting false identification to a law enforcement officer is a violation of State law under §19.2-82.1 *Code of Virginia*.

2. If the officer has probable cause to believe the detained person is in violation of federal immigration law and the person does not produce any of the documents outlined below to prove legal presence, the officer shall inquire as to the legal presence of the person by checking nationwide databases maintained by the U.S. Department of Homeland Security's **Bureau of Immigration and Customs Enforcement (ICE)** or by contacting the **ICE Law Enforcement Support Center (LESC)**. Officers shall conduct a **Query Wanted (QW)** through NCIC. This QW automatically searches the **Immigration Violator File (IVF)** contained in NCIC. ICE is the only agency authorized to enter and maintain records in the IVF.
3. Generally, a person may prove legal presence by producing a valid Virginia Operator's License or Special Identification Card (Adult ID card, Child ID card, or Hearing Impaired Photo ID Card – commonly referred to as a "Walker's ID"), with an **ORIGINAL** issued date of January 1, 2004 or later, as noted in § 46.2-328.1 *Code of Virginia* (Virginia's legal presence law took effect on January 1, 2004). A birth certificate from any U.S. State or Territory, or any of the documents identified by the Virginia Department of Motor Vehicles, as referenced in General Order 45.01, F-11, will also serve as proof of legal presence. If a person produces a document that establishes legal presence, members will not routinely inquire further about the person's legal presence.

4. Whenever an officer runs a wanted check on an individual through NCIC, the IVF database is automatically checked and a "hit" may be received. It has long been the policy of the Department to serve criminal warrants originating from NCIC wanted queries. Similar to other law enforcement agencies, criminal warrants obtained by ICE agents are entered into the NCIC wanted persons' file. However, ICE hits for deported felons and alien absconders are based on administrative warrants and are entered in the NCIC IVF file.

NCIC entries contain both civil and criminal immigration violations. Officers should be careful to determine the nature of the underlying offense resulting in the NCIC entry. An entry into NCIC does not guarantee the officer has actual authority to take the person into custody.

5. Officers who receive an NCIC "hit" on an Immigration Violator File shall carefully read the IVF hit received through NCIC. There are only two (2) possible responses that will appear. Several lines from the top of the response will be the words **"PREVIOUSLY DEPORTED FELON"** or **"OUTSTANDING ADMINISTRATIVE WARRANT OF REMOVAL."**

a. **"PREVIOUSLY DEPORTED FELON"**

- i. The officer shall request a hit confirmation and Criminal Immigration Detainer, as outlined below in B-3.
- ii. If a hit confirmation and a Criminal Immigration Detainer from ICE is received and/or issued, absent other charges which require the subject be taken before the magistrate, the suspect will be brought forthwith to the Adult Detention Center (ADC) which has established policies in place with ICE. An Incident Report titled "Criminal Immigration Arrest" shall be completed.
- iii. If the officer has reasonable suspicion to believe a person has committed or is committing a crime, absent probable cause to arrest for that crime, if a hit confirmation is received from ICE, the officer shall take the individual forthwith before a magistrate and obtain an arrest warrant for a violation of § 19.2-81.6 *Code of Virginia*. Recurrent applications for a warrant under this subsection are not permitted within a six-month period, as enumerated in § 19.2-82 *Code of Virginia*.

If reasonable suspicion does not exist that the arrested person has committed or is committing a separate offense, officers may act solely on the confirmation and detainer issued by the LESC for a "Previously Deported Felon" and the arrested person shall be transported to the ADC as outlined in section ii above.
- iv. The Police Department anticipates the formation of a Criminal Alien Unit, comprised of detectives who are specially trained in ICE's 287(g) program. Once this Unit becomes active, in certain cases these detectives may be requested to respond and further investigate the matter, if circumstances warrant.
- v. Absent independent lawful authority to detain, such as other charges that justify detention or physical arrest, if an NCIC hit is made and confirmation of

a Criminal Immigration Detainer is **not** received or issued within a reasonable period of time, the person must be released. Officers will document the detained person's identification information on a Field Interview Card and forward it to the Crime Analysis Unit.

- vi. If the suspect is remanded to the ADC for another offense, the illegal immigration status shall be relayed to ADC booking personnel, which has established policies and practices in place to coordinate with ICE.

b. **"OUTSTANDING ADMINISTRATIVE WARRANT OF REMOVAL"**

- i. The majority of these ICE warrants represents civil administrative procedures and this hit typically refers to persons who have failed to appear for a hearing or failed to leave the United States after having been ordered to do so.
- ii. Officers shall **not** confirm and shall not request automatic issuance of a detaining order from the database because such detaining order will be invalid on this type of IVF hit and shall **not** take the individual into custody, unless such person is lawfully detained for another violation of the law. Officers will document the detained person's identification information on a Field Interview Card and forward it to the Crime Analysis Unit. The subject must be released.
- iii. While officers may not automatically arrest a person based solely on this hit, officers shall, absent extenuating circumstances, consider this type of NCIC IVF hit as a **factor** in deciding whether or not to release on a summons for a separate violation of the law. This section only applies when an individual is being arrested for another offense for which the law indicates the person be released on a summons unless certain factors are present.

Officers may proceed under §19.2-82 *Code of Virginia* (Arrest without warrant), **only** if the provisions of §19.2-74 *Code of Virginia* or §46.2-940 *Code of Virginia*, are satisfied and the NCIC IVF hit is confirmed.

If the officer takes the suspect before a magistrate, the officer shall request a copy of the hit confirmation. A copy of the NCIC IVF Hit confirmation shall be presented to the magistrate. The illegal immigration status shall be relayed to ADC booking personnel, which has established policies and practices in place with ICE. If the Magistrate orders the suspect to be released officers shall document the suspect's identification information on a Field Interview Card and forward it to the Crime Analysis Unit.

- c. NCIC hits are factors which may provide legal justification to continue detention of a person. The permissible length of a lawful detention in every instance depends on all circumstances.
6. In **all** cases, any time probable cause exists to believe a person is in violation of federal immigration laws, a Field Interview Card shall be completed and forwarded to the Crime Analysis Unit who in turn shall forward the information to the ICE LESC.

7. Officers shall cooperate with federal immigration authorities or provide information as permitted or required by law.

B. Office of Public Safety Communications (OPSC) Response:

1. When a QW (Query Wanted) transaction is conducted through NCIC, the Immigration Violator File (IVF) is automatically searched for records on criminal illegal aliens who have been deported for serious crimes. It also contains records of civil immigration violations or persons who have violated some section of the Immigration and Nationality Act.
2. OPSC shall, as requested, perform initial inquiries between the Department and the ICE LESC. Upon request, OPSC will perform an IAQ (Illegal Alien Query) through NLETS.
3. OPSC will assist members in the confirmation of criminal alien arrest warrants, in accordance with General Order 26.01, E (NCIC Hits). Once the identity of the person and the warrant or detainer is confirmed, the ICE LESC will be contacted for acceptance of a criminal hold on the suspect.
4. Requests for confirmation of active Prince William County warrants shall follow established policy, regardless of immigration status. Any suspected illegal immigration status shall be relayed to the arresting officer.
5. Citizens wishing to make a routine complaint of the illegal immigration status of an individual will be referred to the ICE public tip line. The Police Department will not routinely document or follow-up on such information.

C. Prince William County Criminal Justice Academy (Academy) Responsibility:

1. The Academy's role with regard to this General Order is to provide training to members in the Department's Enforcement of Immigration Laws policy.
2. New recruits will receive initial training as a component of local training.
3. All sworn members will receive mandatory initial training. In-service training will be provided to members as deemed necessary.